Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

80-619

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1980

EDWARD LONEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Stephen Robert LaCheen, Esquire
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Attorney for Petitioner

QUESTIONS PRESENTED

I. Would Petitioner's Rights under the Double Jeopardy Clause be Violated by His Retrial when, Following the Jury's First Indication of Impasse, the Trial Judge Directed that they Deliberate for a Further Period of Not More than One-half Hour, and then Discharged the Jury During that Period?

II. Would Trial of Petitioner Violate His Constitutional Right to Due Process and a Fair Trial when Government Agents Intentionally Destroyed Evidence Exculpatory to Him?

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IN THE
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Term, 1980

EDWARD LONEY,
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TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Apppendix A, infra) was entered on September 16, 1980. This Court's jurisdiction is invoked pursuant to the provisions of Title 28, U.S. Code, §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rules of Criminal Procedure, Rule 16(a)(1)(c)

> Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

STATEMENT OF THE CASE

Petitioner was tried before a judge and jury from March 10, 1980, to March 12, 1980, on charges of conspiracy to distribute and distribution of methamphetamine to a government informant. The District Court had jurisdiction of this matter pursuant to the provisions of Title 18, U.S. Code §3231.

At trial the government introduced evidence that a bottle of liquid seized from Petitioner at the time of his arrest contained P2P, a precursor chemical for methamphetamine. Petitioner timely objected to the introduction of this evidence since the bottle had been destroyed by the DEA, but the objection was overruled, (A16-18).

The jury commenced its deliberations on March 12, 1980. On that day the jury deliberated for approximately four hours and then accepted the option extended by the Court to recess for the evening and resume deliberations on the next day, (A2-4). On March 13, after deliberating two hours, the jury requested a re-reading of certain testimony, transcripts of which were provided to them about 1:00 P.M. At about 4:00 P.M., the foreman sent a note to the Court advising that the jury could not reach a unanimous verdict. The Court brought the jury in and, after expressing reluctance to grant a mistrial at *that* time, asked that they continue their deliberations to "no later than 4:30 P.M." to see if there was any possibility of reaching a verdict. The jury was not then told, as they had been told on the previous afternoon, that they again had the option to recess for the night and resume their deliberations the following day, Friday. At 4:20 P.M., a note from the foreman to the Court advised that the jury was "definitely deadlocked" and their "convictions set", (A5-7).

In response to the Court's inquiry, as to his position in the matter, defense counsel declined to move for a mistrial and made a motion for acquittal, (A-7). The

Court then brought in the jury and asked the foreman whether all of the jurors were of the opinion that they could not reach a verdict, to which the foreman responded affirmatively. The Court then addressed two questions to the jury: (1) whether anyone believed that they would be able to reach a verdict upon further deliberations, and (2) whether anyone disagreed with the Court's view based upon the two notes received from the foreman that the jury was deadlocked. There was no response to either question. The Court then discharged the jury and declared a mistrial, (A8-9). Petitioner's objection to the mistrial was noted and denied, (A-10).

Petitioner thereafter moved to dismiss the indictment herein on the grounds that he had already been placed in jeopardy of conviction for the offense charged when the Court declared a mistrial without manifest necessity so to do, and upon the basis that evidence exculpatory to Petitioner had been destroyed, (A11-12). On April 2, 1980, following argument, the Court entered an Order, denying the motion to dismiss, (A16-17); however, in so doing the Court noted that an appeal on the double jeopardy issue would not be frivolous, (A19-20). Petitioner timely appealed such final Order, on the authority of *Title 28, U.S. Code, §1291,* and *Abney v. U.S.*, 431 U.S. 651 (1977), which appeal was denied on September 16, 1980.

REASONS FOR GRANTING THE WRIT

I. Petitioner's Rights under the Double Jeopardy Clause would be Violated by his Retrial when, Following the Jury's First Indication of Impasse, the Trial Judge Directed that the Jury Deliberate for a Further Period of Not More than One-half Hour, and then Discharged the Jury During that Period.

The constitutional protection of the Double Jeopardy Clause embraces a defendant's "valued right to have his trial completed by a particular tribunal". *U.S. v.*

Jorn, 400 U.S. 470 (1971). In fact, discharge of a jury over the defendant's objection before a verdict has been reached treads upon the central purposes of the prohibition against double jeopardy. *U.S. ex rel. Webb v. Court of Common Pleas*, 416 F.2d 1034 (CA 3, 1975). Thus, the prosecutor bears a heavy burden in seeking retrial after a mistrial has been granted over defense objection in demonstrating that the mistrial resulted from "manifest necessity". *U.S. v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). In a close case, any doubts are to be resolved in favor of barring retrial. *U.S. v. Downum*, 372 U.S. 734 (1973); *U.S. ex rel. Russo v. Superior Court*, 483 F.2d 7 (CA 3, 1973).

In *Perez*, supra, the Supreme Court held that the inability of a jury to agree on a verdict provides manifest necessity for their discharge and that retrial under such circumstances is permissable.

In *U.S. v. Gordy*, 526 F.2d 631, 635-636 (CA 5, 1976), the Court of Appeals for the Fifth Circuit elucidated the factors to be considered in determining whether there was a manifest necessity to discharge the jury as follows:

> As an aid in applying the PEREZ test to concrete cases, the courts of appeal have isolated several pertinent factors, though emphasizing that no one is necessarily controlling. If a timely objection has been made by the defendant, the reviewing court should consider the length of the trial, the complexity of the issues involved and the length of deliberations. In addition, the trial judge's communications with the jurors are particularly significant. The Ninth Circuit has held that a statement from the jury that it is hopelessly deadlocked is a crucial factor, although a present inability to agree is not determinative of the question of whether future deliberations might prove helpful. United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), cert. denied sub

nom., Gordon v. United States, 420 U.S. 992, 95 S.Ct. 1428, 43 L.Ed. 2d 673 (1975).

In the instant case the jury deliberated for only 10 hours before its discharge. Petitioner respectfully submits that the jury was discharged prematurely in view of the fact that the jury had heard 2½ days of testimony from witnesses, none of whom had given direct testimony of the offenses charged.

Moreover, the length of the jury's deliberations must be considered in the context that the jury's first indication of impasse came after 9½ hours of deliberation. After receiving the foreman's first note that the jury was deadlocked, the Court asked that the jury continue its deliberations for a period of not more than half an hour to determine if there was a possibility of reaching a verdict. The Court's limitation of the period of continued deliberation, coupled with its failure to advise the jury that, as on the previous day, they could recess for the night and resume deliberations on the following day, may have discouraged the jury from attempting to reach a unanimous verdict, and further may have discouraged the members of the jury from disagreeing with the Court's view stated to the jury as a whole that the jury was deadlocked. See *U.S. ex rel Webb v. Court of Common Pleas*, supra.

Finally, while the principal contested issue may not have been complex conceptually, it may have been onerous to resolve insofar as it involved the credibility of an individual who did not testify and whose out-of-court statements were introduced only via the testimony of a paid government informant.

Accordingly, the indictment in the above matter should have been dismissed because reprosecution of the Petitioner is barred by the Double Jeopardy Clause.

II. Trial of Petitioner would Violate His Constitutional Right to Due Process and a Fair Trial when Government Agents Knowingly Destroyed Evidence Exculpatory to Him.

Fed. R. Crim. P. Rule 16(a)(1)(c), requires the government upon request to permit the defendant to inspect, copy, or photograph tangible objects "which are material to the preparation of his defense . . . or were obtained from or belong to the defendant." Prior to the trial herein Petitioner requested that the government produce at trial the bottle allegedly seized from him at the time of his arrest, but was not advised until trial had begun that the bottle had been destroyed pursuant to a departmental directive.

The bottle was material to the Petitioner's case because a government witness testified that Petitioner was observed accepting an allegedly surreptitious delivery of a bottle on the day of the alleged offense and the government attempted to create the inference that this bottle was the same bottle allegedly seized from Petitioner at the time of his arrest. Thus, the destruction of the bottle rendered the Petitioner unable to prove that in fact it was not the same bottle.

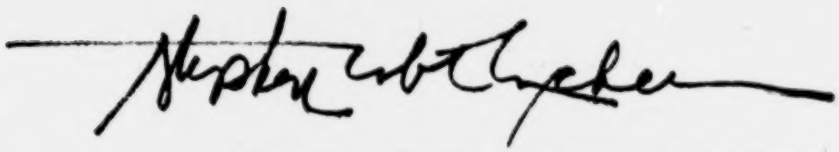
This evidence was clearly discoverable under Rule 16, and was material to the defense, and as a result of the government's intentional destruction of same the indictment herein should have been dismissed. See *U.S. v. Bufalino*, 576 F.2d 446 (CA 2, 1978); *U.S. v. Miranda*, 526 F.2d 1319 (CA 2, 1975).

The Court of Appeals had jurisdiction of the issue raised on appeal herein, since by way of analogy to *Abney v. U.S.*, supra, if the Petitioner's claim is valid he should not be tried at all. See also *U.S. v. Griffin*, — F.2d. —, 27 Cr.L. 2052 (CA 9, 1980).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, which affirmed without discussion a Bench Opinion of the United States District Court for the Eastern District of Pennsylvania.

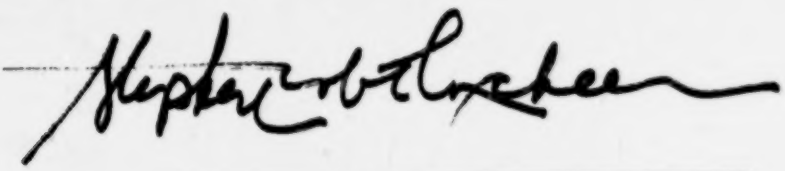
Respectfully Submitted,



STEPHEN ROBERT LACHEEN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that three copies of the Petition for Certiorari to the United States Court of Appeals for the Third Circuit and Appendix thereto were served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the mail, first class postage prepaid, on this date.



STEPHEN ROBERT LACHEEN
Attorney for Petitioner

DATED: October 15, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1485

UNITED STATES OF AMERICA

v.

LONEY, EDWARD,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 79-00250-02)

Submitted Under Third Circuit Rule 12(6)
September 16, 1980
Before: ALDISERT, ROSENN and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) defendant's retrial would constitute double jeopardy because a mistrial was declared without manifest necessity; and (2) trial of defendant would violate his constitutional right to due process and a fair trial when government agents knowingly destroyed evidence exculpatory to defendant; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed on the first issue, and the appeal dismissed on the second issue for lack of jurisdiction under 28 U.S.C. § 1291.

By the Court,

/s/ ALDISERT

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
JOAN BAISCH,
Defendant.

Criminal Action

Philadelphia, Pennsylvania
March 12, 1980

Before:
THE HONORABLE DONALD W. VANARTSDALEN, J.

Appearances:
RUTH V. SIMON, ESQ.,
Assistant U. S. Attorney
For the Government.

STEPHEN LACHEEN, ESQ.,
Attorney for the Defendant.

[2]

MR. LACHEEN: Could you tell us what is happening?

THE COURT: Well, I think the jury probably wants to go home and I just wanted to make it clear they can if they don't reach a verdict. That's up to them how long

they want to stay because I know some of them catch trains around 5 o'clock and I want them to know they have a right, if they wish to recess, to do so.

(The jury entered the courtroom at 4:35 p.m.)

THE COURT: Members of the jury, the only reason I asked you to come in is because it's a little after 4:30. I know that some of you live some distance away and you're relying on public transportation. It's entirely up to you how long you want to continue with your deliberations this evening.

If you are unable to reach a decision, and you at this time or whatever other time this evening that you think is reasonable and you wish to recess and to come back tomorrow to continue with your deliberations, you certainly may make that request and I would grant such a request.

I just wanted you to understand that so that you don't think you're compelled to stay here

[3]

until you do reach some decision or to stay here all night or anything of that sort.

So the jury may go back and continue with your deliberations if you wish. If you wish to recess at any time, let the marshal know and we will direct that you come back.

MR. LACHEEN: Will your Honor see counsel a second?

(At this time a sidebar conference was held, as follows:)

MR. LACHEEN: Does your Honor want to also give them any option of having dinner here and then continuing their deliberations if they want?

THE COURT: They could.

(End of sidebar conference.)

THE COURT: I might also say, if you wish to continue on with your deliberations this evening, we might

try to make some arrangements. We'll try to get you something to eat or to get you dinner. Please now continue with your deliberations.

(The jury exited the courtroom at 4:38 p.m.)

THE COURT: I have a note. It's signed "Your Honor, Judge VanArtsdalen, we the jury request that we recess for the day and come back tomorrow to

[4]

continue our deliberations, signed John McAfee."

I will ask the jury to come in and I will excuse them until tomorrow.

(The jury entered the courtroom at 4:45 p.m.)

THE COURT: All right, ladies and gentlemen, I have a note from the foreman saying that you wish to recess now and come back tomorrow to continue your deliberations, which is agreeable with me. We'll grant that request.

Now, if any of you have any personal necessities or anything of that sort, keep them, retain them yourself and do not show them to anyone during the interval. The exhibits will be kept by the marshal or by one of our court personnel. It's most important that you not discuss this with anyone, no one at home, no members of your family, and you'll be brought back here tomorrow and I'll ask you specifically whether any of you have discussed the facts of this case.

So with that admonition, you're now excused until 9:30 tomorrow morning.

(The jury exited the courtroom at 4:45 p.m.)

THE COURT: All right, I will require counsel to be here at 9:30 and the defendant, so that

[4A]

we can be sure that all the jurors are here.

MR. LACHEEN: Thank you, your honor.

(The court adjourned at 4:45 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Criminal Action
v.
EDWARD LONEY,
Defendant. No. 79-250-2

Philadelphia, Pennsylvania
March 13, 1980

Before:
THE HONORABLE DONALD W. VANARTSDALEN, J.,
and a Jury

Appearances:
RUTH V. SIMON, ESQ.,
Assistant U. S. Attorney
For the Government.

STEPHEN LACHEEN, ESQ.,
Attorney for Defendant Loney.

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[9]

request if it has been transcribed, and I understand that all of the testimony has been transcribed.

All right, you may hand that to the foreman and you may proceed to the deliberations, members of the jury.

(The jury exits the courtroom at 12:52 p.m. and the court recesses at this time.)

(The court resumes at 3:47 p.m.)

THE COURT: In the case of the United States versus Edward Loney, I have a note from the jury which says, "Question: Your Honor, Judge VanArtsdalen: *After careful deliberations, we, the jury, cannot reach a*

unanimous verdict on either indictment. What do we do now?" Signed "John McAfee."

I want suggestions by counsel.

MR. LACHEEN: Whatever the Government suggests, I want the other. I suppose, your Honor, if the jury says that there is no possibility and the Court is satisfied with that, then the Court does not have any option?

On the other hand, I certainly don't want a dynamite charge. If they can't agree, they can't agree, but I think we should try to determine whether there's any possibility.

THE COURT: I agree with that. I think

[10]

I'll have the jury come in and probably we'll suggest that they continue with their deliberations a little while longer.

(The jury enters the courtroom at 3:49 p.m.)

THE COURT: Members of the jury, I have a note which says that, "After careful deliberation, we, the jury, cannot reach a unanimous verdict on either indictment. What do we do now?"

I presume that you mean you cannot reach a unanimous verdict on each — either of the two charges. Let me say to the jury that wherever it's possible for a jury to do so in good conscience, it's preferable, of course, that there be a verdict returned.

If a jury is unable to reach a unanimous verdict after careful consideration and deliberation, then, of course, we have no alternative but to declare a *mistrial.* I am reluctant to do that at this point.

May I suggest to the jury that you should carefully consider the views and opinions of each other and of all of you and you should weigh those opinions carefully. This is not to suggest and you should not, under any circumstances, give up your conscientious convictions simply for the sake of

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reaching a verdict or a decision.

I would ask that you go back and try once more to see if there's any possibility of you reaching a unanimous decision. Let me point out to you that all parties and that the defendant has the right to hope that a jury will be able to reach a verdict in a particular case, as well as the Government. I would ask that you go back and continue with your deliberations until — I will say *no later than 4:30* because I know some of you want to get public transportation, but see if there's any possibility.

If you conclude that there's no possibility of reaching a unanimous decision on either count, then you may report that back to us and I'll have to take the matter — take that into consideration at that time. So I would ask you, however, to continue with your deliberations just a little bit longer to see if there's any possibility at all.

All right.

(The jury exits the courtroom at 3:51 p.m.)

(The court recesses at 3:52 p.m.)

(The court resumes at 4:20 p.m.)

THE COURT: I have a note from the jury that says, "*Your Honor, we are definitely deadlocked.*

[12]

Our convictions are set." Signed "John L. McAfee."

MR. LACHEEN: I'm sorry, we're definitely —

THE COURT: "We are definitely deadlocked. Our convictions are set."

In view of that, does counsel for the defendant have any application or motion?

MR. LACHEEN: I have none, your Honor. We'll accept a move for the verdict of not guilty.

THE COURT: What is your position as to a mistrial?

MR. LACHEEN: *I will not ask for it*, your Honor.

THE COURT: Well, it seems to me that the cases are clear that a jury should not be discharged precipitously, but where we have had two notes now from the

jury saying that they cannot reach a verdict, in view of the fact they say we are definitely deadlocked, our convictions are set, then it seems to me that under those circumstances, in view of the fact that they have been deliberating on this case for over a day and a half, that it's necessary to declare a mistrial on the case.

Does the Government have any position?

[13]

MS. SIMON: No, your Honor.

THE COURT: All right, I'm going to ask the jury to come in.

MS. SIMON: Your Honor, I would ask permission to speak to the jury.

THE COURT: I beg your pardon?

MS. SIMON: I would ask permission to speak to the jury at some other time.

THE COURT: You mean, if they are excused?

MS. SIMON: In the event that they are excused.

THE COURT: I'll consider that motion.

(The jury enters the courtroom at 4:25 p.m.)

THE COURT: Members of the jury, I have a note that says, "Your Honor, we are definitely deadlocked. Our convictions are set." Signed, "John L. McAfee."

Now, Mr. McAfee, do I understand from this that all of the jurors are of the opinion that they cannot reach a — you cannot reach a verdict as to either of the acts?

MR. McAFEE: Yes, sir.

THE COURT: Is there anyone among you

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who believes that if there were further deliberations, you might be able to reach a verdict?

No one is answering in the affirmative.

The reason I ask these questions, members of the jury, is that, of course, as you may be aware, there is a principle in our law known as — generally called double

jeopardy, which means a person may not be twice placed on trial for the same offense. There are situations, of course, where a person — where there is an error in the trial and a new trial is directed or where if a jury is hopelessly deadlocked, a mistrial is directed and a new trial can be in order under those circumstances.

But it's improper to discharge a jury precipitously.

That is to say, where the jury simply has not properly considered or deliberated on the case and that's the reason I have been so careful in asking you about this, so that we can be sure that by discharging you, that does not mean that the defendant cannot be retried.

It's my view and my opinion in view of the statements, two notes, which have been received from the jury and your last statement, that you are definitely deadlocked and that your convictions are

[15]

set, that it's impossible for this jury in good conscience to reach a verdict in this case.

Is there any one of you who does not agree to that statement?

(No response.)

All right, then we will direct a mistrial and direct that the jury be discharged.

Members of the jury, I know that it's a disappointment to all of you that you have been unable to reach a verdict in this case. It does occasionally happen. It's very rare. I have not had any such case in a long while.

But I think no one — no member of the jury is to be criticized or anyone criticize each other, either actually or in your own minds concerning the verdict which you have been unable to reach.

In view of the nature of the evidence that was presented in the case and the fact that the law requires that there be a reasonable doubt that a jury not find a person guilty, I can quite understand why there would be

strong convictions among you that would not — that you would not be all of one mind about this matter, and that it is not surprising to me, therefore, that you have not been able to reach a verdict, although it is a disappointment to me,

[20]

Government.

MR. LACHEEN: Judge, before I forget, *I would just like to formally put an objection on the record on the declaring of a mistrial.* I indicated that I would not ask for it, just so that it's there for whatever purpose I can —

THE COURT: All right, *that motion is noted and denied.* I think it's clear in this case that it was not a precipitous discharge of the jury.

The defendant will remain on bail heretofore set until subsequent trial.

MR. LACHEEN: In that connection, I did want to remind your Honor, Mr. Loney's getting married next week and he has a 15-day honeymoon scheduled. I thought I would notify you for scheduling purposes. This was scheduled back around January, when we thought the case was going to be tried January 15th.

THE COURT: Well, I won't continue the case for any reason such as that, but I think we won't reach the trial until two weeks from now.

MR. LACHEEN: Thank you, your Honor.

I want these questions from the jury made a part of the record. There are four particular notes that came from the jury and I'm going to mark

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	CRIMINAL ACTION
v.	Number 79 - 250
EDWARD LONEY	Sur Charge:
	21 USC 846, et al

SUPPLEMENTAL MOTION TO DISMISS INDICTMENT

To the HON. DONALD W. VANARTSDALEN, Judge of the said Court:

Defendant above named, by his attorney, respectfully moves the Court to dismiss the indictment herein on the following grounds:

A. *RENEWAL OF PRIOR MOTION TO DISMISS INDICTMENT*

1. Defendant incorporates herein by reference thereto, and hereby renews, the grounds for dismissal set forth in the Motion to Dismiss Indictment previously filed by him herein.

B. *DOUBLE JEOPARDY*

2. Defendant has already been in jeopardy of conviction of the offense charged herein, in a trial which began March 10, 1980, and ended on March 13, 1980, when the Court declared a mistrial without manifest necessity so to do.

C. *DESTRUCTION OF EVIDENCE*

3. During the pendency of these proceedings, the government agents knowingly destroyed evidence which was exculpatory to the Defendant, e.g., a one gallon bottle, allegedly taken from Defendant, in violation of Defendant's constitutional right to due process of law and a fair trial.

D. *FAILURE TO PRODUCE JENCKS ACT MATERIAL*

4. At the time hereof, the government failed to

produce certain Jencks Act Material, e.g., the agents "rough notes", despite timely demand for same, in violation of Defendant's constitutional right to due process of law and a fair trial.

WHEREFORE, Defendant moves the Court to schedule an evidentiary hearing herein and following same, if appropriate, to dismiss the indictment against him herein, with prejudice.

Respectfully Submitted,

STEPHEN ROBERT LACHEEN
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v. CRIMINAL NO. 79-250
EDWARD LONEY

GOVERNMENT'S ANSWER TO DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS INDICTMENT

COMES NOW, the United States of America, by its attorneys, Peter F. Vaira, United States Attorney in and for the Eastern District of Pennsylvania and Ruth V. Simon, Assistant United States Attorney in and for same District and hereby answers defendant's Motion as follows:

1. The Government incorporates herein by reference its answer to defendant's prior Motion to Dismiss Indictment.

2. The mistrial declared by the trial court was based on a jury deadlock of a day and a half and also based on two notes by the jury stating that they were very firm in their convictions and could not reach a verdict. Thus, the court's decision to declare a mistrial was based on circumstances which amount to manifest necessity and a second prosecution is not prohibited. *Arizona v. Washington*, 434 U.S. 497, 509 (dictum); *Virgin Islands v. Smith*, 558 F.2d 691, 696 (3d Cir.), *cert. denied*, 434 U.S. 957 (1977).

3. The Government denies that the destruction of the bottle which contained evidence which was analyzed by the DEA laboratory and found to contain phenyl-2-propanone (P2P), in any way violated defendant's constitutional right of due process. The Third Circuit has found in *Government of the Virgin Islands v. Testamark*, 570 F.2d 1162 (3d Cir. 1978), that evidence which was destroyed before it could be tested did not require a reversal of defendant's conviction where there

was no reasonable possibility that the outcome of the case would have been effected had the evidence been preserved. In the instant case, the evidence was tested and as a sample is available for defendant to test. The destruction of the container does not in any way effect defendant's right to due process or a fair trial.

4. The Government admits that the agent's rough notes were not turned over to the defendant during the trial. The Government denies that the rough notes fall within the provisions of the Jencks Act, 18 U.S.C. §3500, since a final version of the notes containing all the information in the rough materials was produced and given to defense counsel. *United States v. Meisch*, 370 F.2d 768, 722 (3d Cir. 1966). However, the Government agrees that the rough notes should have been preserved for examination by the Court. *United States v. Walden*, 578 F.2d 966, 970 (3d Cir. 1978). During the pre-trial suppression hearings Agent Hershowitz testified (N.T. p. 81-82) that it was his practice to discard the rough notes after a final report was typed. The record shows that the agent's destruction of rough notes was in good faith. The Government therefore believes that the fact that they were not produced is harmless error in view of the fact that they were transcribed and the transcribed notes were available to the defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
EDWARD LONEY

Criminal Action
No. 79-250
Court's Rulings
on Motions

Philadelphia, Pennsylvania

April 2, 1980

Before: THE HONORABLE DONALD W. VANARTSDALEN, J.

Appearances:

RUTH V. SIMON, ESQ.,
Assistant U.S. Attorney
For the Government.

STEPHEN LACHEEN, ESQ.,
Attorney for Defendant Loney.

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Now the Government likewise took no position in this matter. So that it was a matter that was entirely up to me.

It seems to me, under the circumstances, that even if the jury had thereafter continued with its deliberations, had it reached a verdict of guilty, it is perfectly obvious to me that verdict could not have withstood a motion by reason of a contention that the jury had previously stated that they were — first they said — the first expression was that they could not reach a unanimous verdict on either indictment, and I think that was clarified in questioning as to mean either count of the in-

dictment; and the second note said: "We are definitely deadlocked. Our convictions are set."

It seems to me that it would have been improper to compel a jury thereafter to continue with deliberations, and in effect, require one or more of the jurors to reach a verdict that was not in accordance with that jurors' conscientious opinion.

Therefore *the motion to dismiss by reason of double jeopardy will be denied.*

There has also been a motion to dismiss because certain alleged rough notes were not produced to defense counsel, and were not produced during the

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course of the trial.

As I view the evidence, there is no evidence that, in fact, there were any rough notes, except those of Agent Hershowitz, and it was stated that they were all transcribed, and that the rough notes were destroyed thereafter.

I do not consider that to be any violation of the defendant's rights, and certainly there is no showing that there was anything different on any of the notes of Agent Hershowitz from that which was contained in the transcribed notes.

The fact that there may have been other surveillance agents who made notes, there is no evidence that they took any notes. I don't believe that they were questioned about that in any way, and in the absence of such a showing, it would seem to me, and particularly since there is no showing that there was any notes at any time, that in any way contradicted anything stated by any of the witnesses, that that motion must be denied.

There has also been a contention there was destruction by Government agents of a vital piece of evidence, namely a bottle that contained P2P, the bottle having been seized from the defendant's car at the time that he was arrested.

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I find the destruction of that bottle inexplicable. I cannot understand, and certainly no satisfactory explanation has been made to this Court why that bottle was destroyed. It's my understanding, from the testimony, that it was destroyed more or less as a routine matter because it was simply too bulky and a lot of other pieces of evidence were gathering dust, as it were, and that the agents, without apparently at all consulting with the U.S. Attorney's office, destroyed this bottle, and it was destroyed just approximately a month, I believe, or within several months prior to the actual trial of this case. That bottle certainly was a matter that could conceivably have been of benefit to defense counsel in the arguments that he wished to make.

It is true that there may have been no evidence that the bottle that was first observed being carried by Mr. Loney into his business establishment, was the same bottle that was later found in his car and contained P2P. But obviously if it had any relevance at all in the case, it was for the purpose of giving that as a possible inference, or at least that the contents of the one bottle was thereafter dumped into the contents of the other bottle, and it is a matter of concern to me.

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However, I do not think that that was of such vital importance in the prosecution of this case.

To begin with, of course, the defendant is not charged with possession of P2P, which would not be a criminal offense, or would not have been at that time, but is charged with distributing in a conspiracy to distribute processed methamphetamine.

Therefore the motion will be denied, the motion to dismiss the indictment, on that basis.

Although I must say that I do so with a great deal of criticism for the agents, or whoever was responsible for

having that bottle destroyed; even though I am sure that it was done without realizing that it might be of some value to defense.

I don't suggest that there is any evidence that it was done for the deliberate purpose of destroying the evidence. If I thought that were the case, or thought there was evidence of it, I might consider dismissing the indictment.

There has also been a contention that the evidence is insufficient as a matter of law, and that a judgment of acquittal should be entered.

That argument was previously made at

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the trial, and I have ruled against that, and after reviewing the matter I see no reason to change that ruling. I believe there was sufficient evidence for the jury to consider, and therefore that motion will be denied.

One further thing that I want to say on the double jeopardy argument. Had this been a very lengthy trial, with complicated testimony, then to have dismissed a jury after a day and a half's deliberation might possibly be considered too soon a time; but this was a very short trial, there was very little evidence, the factual issues involved were extremely limited and well focused on by counsel and to say that the deliberations of the jury, which took almost as long as the entire trial, or certainly as long, perhaps longer than what the presentation of the evidence in the case took, it seems to me is a strong indication that the jury was unable, in good conscience, to reach a verdict, and would not have been able to reach a verdict no matter how long they had been kept in confinement.

I would also point out, because there was some mention made by counsel that during the jury deliberations, the jury received two lunches. The lunches were served to them in the juryroom, and

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retrial. There was also a determination by the District Court, and Court of Appeals, both the panel and the impaneled court, apparently, that it was clearly frivolous and without any merit whatsoever, the basis for the appeal.

I can only make a personal observation that I believe that the Government is correct when they say that the appeal, insofar as the defendant is concerned, is being made primarily for the purpose of delay as a dilatory practice.

I am not in a position, however, to say that it is necessarily frivolous, because there are many cases, in all the circuits, that have gone to the question of under what circumstances a judge may discharge a jury without consent, or without expressed consent of the Government or the defense counsel.

And without in any way criticizing the case of the United States v. Dunbar, particularly because of its unusual factual situation, I would point out that in the landmark case of the Supreme Court of the United States, which did determine this issue, namely the Abney case, Abney v. United States, 431 U.S. 651, the Supreme Court expressly considered the fact that this could lead to frivolous

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dilatory appeals, and at least it is my understanding of the opinion in that aspect of it that the Supreme Court said they didn't think that was apt to happen too frequently, and if so, it was just one of the unfortunate things that would simply happen.

I think the inference from the opinion is that even if it's a purely completely frivolous appeal, that the right of appeal still exists. Whether if a court should find that it was completely frivolous and dilatory, some other punitive measure might in some way be taken against a de-

fendant or defense counsel, of course I have no way of knowing, but certainly the Abney case, as I read it, makes it clear that if there is a question of double jeopardy, first the person asserting that right will have an absolute right to appeal before the case could proceed for a second trial.

Therefore the suggestion that we should proceed notwithstanding the fact of the appeal, on the basis of the case of United States vs. Dunbar, I will reject that proposition.

One thing else I want to put on the record, in that regard, as to the problem of a dilatory appeal or frivolous appeal.

The Court of Appeals, of course,